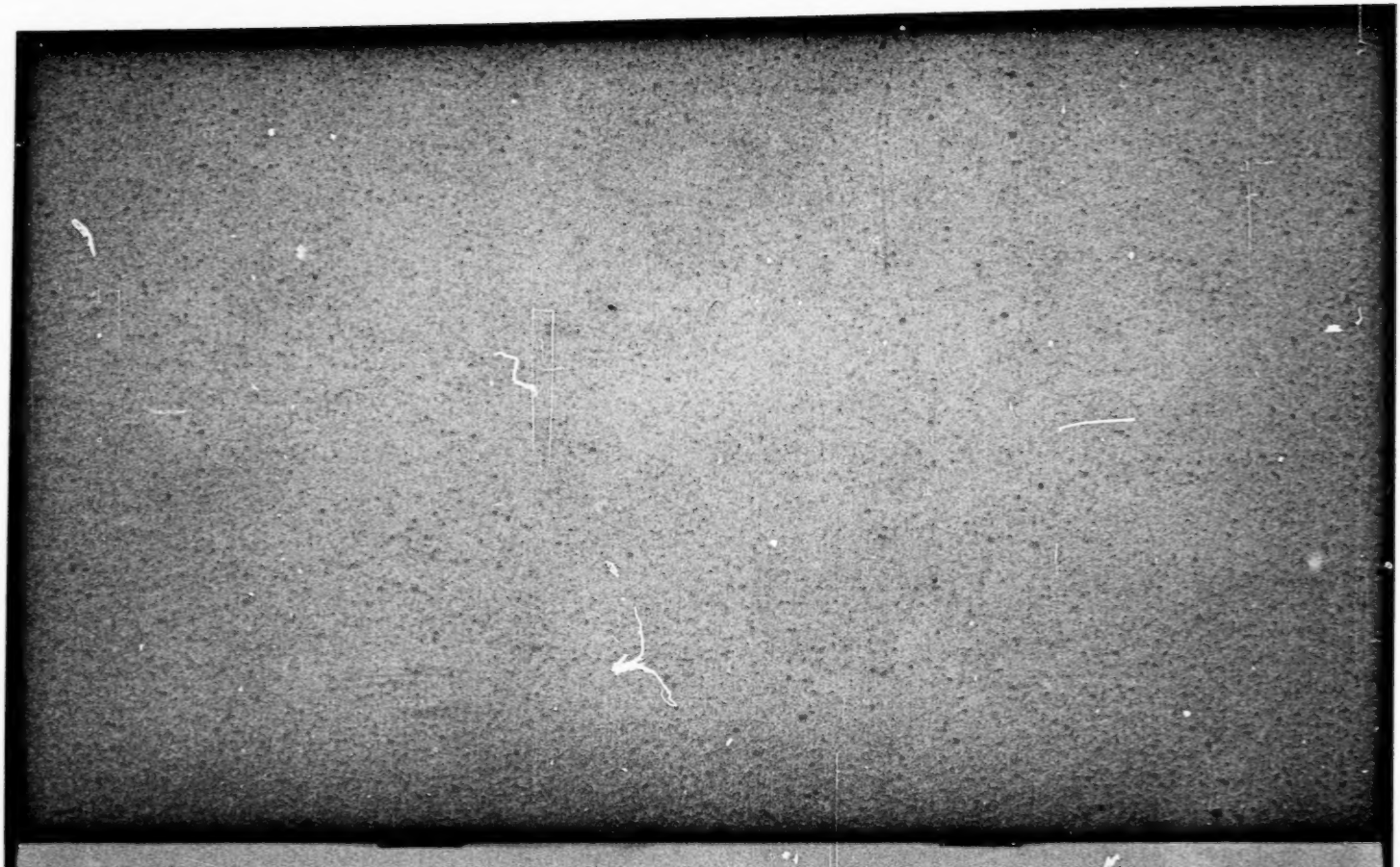

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-571

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION; RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA; INDIANA & MICHIGAN MUNICIPAL DISTRIBUTORS ASSOCIATION; ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT CITY OF AUBURN, INDIANA IN OPPOSITION

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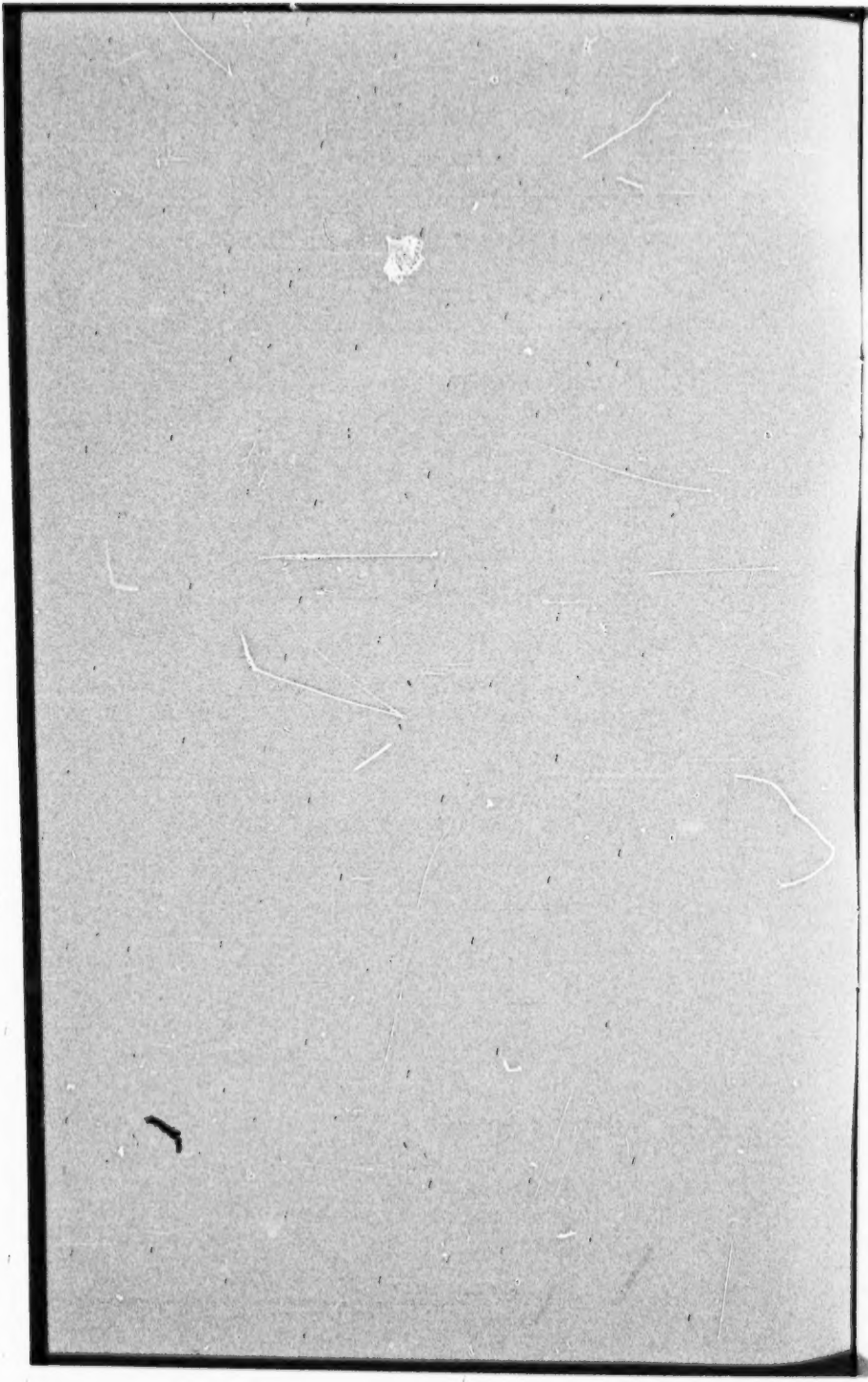

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BRIEF FOR THE RESPONDENT CITY OF AUBURN, INDIANA * IN OPPOSITION

---

* The City of Auburn, Indiana has been a member of the Indiana & Michigan Municipal Distributors Association, one of the Respondents herein. Auburn, however, relinquished its membership in the Association and the undersigned entered an appearance on behalf of Auburn before the Court of Appeals during the pendency of this dispute. Following the initial decision of the Court of Appeals, Auburn filed a Petition for Rehearing and Suggestion for Rehearing In Banc on its own behalf. See *Indiana & Michigan Electric Co.* v. *FPC*, 502 F.2d 336, 343, fn. 1 (D.C. Cir., 1974).

OPINIONS BELOW

The opinion, judgment and order of the United States Court of Appeals to which the Petition for a Writ of Certiorari is directed are accurately and adequately set forth in the Appendix filed by the Petitioner at pp. 1a-27a. The decision is now reported as *Indiana & Michigan Electric Co.* v. *FPC*, 502 F.2d 336 (D.C. Cir., 1974).

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court below properly modified its original decision and opinion in light of the clear equities prevailing between the parties?
2. Whether this Court need intercede in the relationship of the litigants in light of the fact that the dispute is episodic, of significance only to the litigants herein, and will not occur again?

STATUTES INVOLVED

The issues posed in the Petition for a Writ of Certiorari involve Sections 205, 206 and 313 of the Federal Power Act, 16 U.S.C. Section 791, *et seq.*, pertinent portions of which have been set forth by the Petitioner in the Appendix at pp. 51a, 53a and 54a, respectively.

COUNTERSTATEMENT OF THE CASE

The present Petition represents the second time that the Petitioner, Indiana & Michigan Electric Co. (hereinafter I&M), has been before this Court seeking relief from opinions and judgments of the United States Court of Appeals for the District of Columbia Circuit involving the same (or nearly so) parties and orders of the Federal Power Commission (hereinafter Commission) in the

same proceeding. *See Richmond Power & Light* v. *FPC*, 481 F.2d 490 (D.C. Cir., 1973), *cert. denied sub nom., Indiana & Michigan Electric Co.* v. *Anderson Power & Light*, 414 U.S. 1068 (1973).

In *Richmond*, this Court refused to review a determination that I&M was precluded from filing unilateral rate increases with the Commission where certain of its wholesale customers purchase electric energy pursuant to contract. *See, United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

Here I&M again seeks review by this Court of a decision wherein I&M was granted the precise relief it requested from the Commission in its challenge to the legality of the Commission's initial action.

I&M's Statement of the Case and description of the decision of the Court of Appeals misleads, in that it is incomplete. The Court of Appeals, in its initial decision, had held that the Commission's so called 60-day filing regulation, 18 C.F.R., Section 35.13(b)(4)(i) was illegal and *ultra vires* since it illegally expanded the 30-day notice requirement of Section 205(d) of the Federal Power Act. *Cf., Municipal Light Boards* v. *Federal Power Commission*, 450 F.2d 1341 (D.C. Cir., 1971), *cert. denied*, 405 U.S. 989 (1971). The Court stated:

> Because the Commission lacked statutory authority to delay the effective date of I&M's filing until 13 August 1972 and to suspend the new rates until 13 January 1973, we vacate the Commission's order of 11 August 1972 and remand to the Commission with instructions that I&M's 13 June rate filing be given effect as of 14 July 1972. (502 F.2d at 339.)

As a corollary to its holding, the Court of Appeals opined that I&M would be entitled to collect from affected customers the difference between the increased rates and

the rates actually charged for the period July 14, 1972 to January 13, 1973, or *six months.*

In doing so, the Court overlooked two basic facts. First, I&M in its petition for rehearing of the Commission's Order of August 11, 1972, requested only that the Commission:

> (i)ssue a supplemental order modifying ordering paragraph (s) of its August 11, 1972 Order in this proceeding, so as to provide that I&M's proposed rate schedules are suspended for five months beginning July 14, 1972 and their use deferred until December 14, 1972 . . . (502 F.2d at 346.)

I&M's request, if accepted, would have meant only a *one month* incremental levy against affected customers and the rate increase would have been subject to refund. Second, a six-month levy against affected customers would have resulted in a windfall to I&M of millions of dollars; revenues which I&M never requested from the Commission in its petition for rehearing and revenues which, as the Commission found, I&M was not entitled to under its rate filing. Affidavits from representatives of the affected customers made it clear to the Court of Appeals that its initial decision, if allowed to stand, would imperil the very existence of those customers. 502 F.2d 344, fn. 5.[1]

Under these circumstances, then, it is submitted that the Court of Appeals had no choice but to modify its initial decision to accurately reflect and accommodate the equities between the parties. The Court of Appeals recognized that it was Commission error that led to the

[1] The Court of Appeal's initial decision would have imposed still another onerous burden on affected customers: I&M's clearly excessive rate filing would not have been subject to refund under Section 205(e) of the Federal Power Act following conclusion of hearings thereon. Over two and one-half years have passed since I&M's filing and proceedings have not yet concluded.

dispute, and that its initial decision gave I&M more than it ever requested before the Commission. As will be seen, under the unique circumstances of this case there is no need for this Court to intercede. The Court of Appeals was correct both on the facts and in interpreting and applying its equitable powers.

ARGUMENT I

THE MODIFICATION OF THE ORIGINAL DECISION WAS A PROPER EXERCISE OF THE EQUITABLE POWERS OF THE COURT OF APPEALS

There is and can be no dispute as to where the equities lie as between I&M on the one hand, and affected customers on the other.

In its Petition, I&M neither alludes to nor challenges the determination by the Court of Appeals that the equities clearly favor I&M's affected customers. Rather, I&M mounts a challenge to the Court of Appeal's authority to issue a remedial order based on the clear equities of this case. That challenge must fail.

While there is a paucity of decisional authority on an appellate court's equitable powers under the Federal Power Act, this Court has already held that appellate tribunals possess equitable authority to issue remedial orders under the analogous and nearly identical provisions of the Natural Gas Act.

Section 313(b) of the Federal Power Act gives the appellate tribunal authority to affirm, modify or set aside orders of the Commission. Section 19 of the Natural Gas Act vests the appellate tribunal with identical authority. 15 U.S.C. Sec. 717, *et seq.*

In *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949) (hereinafter *Interstate*), this Court clearly held

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In *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949) (hereinafter *Interstate*), this Court clearly held

that an appellate tribunal is vested with equitable powers by Section 19 of the Natural Gas Act which transcend the statutory scheme established by Congress thereunder. In *Interstate*, the Commission issued a rate reduction order pursuant to Section 5 of the Natural Gas Act. The producer applied for and was granted a stay by a district court.

During the pendency of the litigation concerning the lawfulness of the Commission's rate reduction order, the producer paid excess revenues collected into the registry of the court. Following the conclusion of litigation which upheld the Commission's action, competing claims were made for disbursal of the fund. The claimants included three pipe-line companies whose excessive payments made up the fund, the local distributing companies who made payments to the pipe-line companies, and the end-use, consuming public represented by State and municipal agencies. Of the claimants, the relationship between the pipe-line and distributing companies was subject to the jurisdiction of the Commission, while the relationship between the distributing companies and their end-use customers was not subject to the Commission's jurisdiction.

The Court of Appeals held that the pipe-line companies were entitled to the refund since they had made the excessive payments. While the Court was split on how relief should be effectuated, there was agreement that the Court of Appeals should be reversed and the ultimate beneficiaries of the fund should be the end-use consumers. It is this precise group that was and is beyond the jurisdiction of the Commission.

Justice Douglas, speaking for the Court, stated:

> It is said that the federal court could not bypass the pipe-line companies without undertaking to pass on the reasonableness of the rates which they have

charged—a matter beyond its competence except on review of orders of the Commission. But it is not rate-making to determine the equity of the claim of the pipe-line companies to the fund. The federal court, through exercise of its power under Section 19 of the Act, issued the stay order under which the fund was accumulated. When a federal court of equity grants relief by way of injunction it has a responsibility to protect all the interests whom its injunction may affect. *Inland Steel Co.* v. *United States*, 306 U.S. 153. It assumes the duty to make disposition of the fund in accord with equitable principles. *United States* v. *Morgan, supra*, at 191. (336 U.S. at 582-83).

A concurring Justice Frankfurter stated:

> It would, therefore, appear to be clear that the judicial duty is to deal fairly with a trust fund held to await the outcome of judicial review of the end that it may be distributed on the basis of what would have taken place had the Power Commission's order gone into effect at once.
>
> The task, then, for the Court of Appeals is to reconstruct, as far as it can possibly be done, what would have happened had no fund accrued. Reasons of equity produced the fund; equitable considerations must determine its distribution. The governing principle is that of unjust enrichment. *Since the task of the court is to place the parties in the position in which they would have been had there not been a postponement of the effective date of the rate-reduction, it is now the duty of the court to make that retrospective determination not by unfounded assumptions erected into rigid legal rules, but by an ascertainment of what actually would have happened contemporaneously had purchasers from Interstate obtained their gas at the lower rate.* (336 U.S. at 386). (Emphasis supplied).

Thus, it is clear that this Court has held that, under Section 19 of the Natural Gas Act, appellate tribunals

are not divested of their traditional equitable powers in proceedings arising under the Natural Gas Act. Under the *Mobile-Sierra* decisions, *supra*, the *Interstate* rational is directly applicable to proceedings arising under the Federal Power Act.

I&M's claim in its Petition that an appellate tribunal reviewing disputes arising under the Federal Power Act sits only "as a court of law rather than as a court of equity" is startling. I&M claims:

> By this section (Section 313), Congress granted the Court of Appeals jurisdiction to review orders of the FPC, but the jurisdiction conferred is precisely detailed and severely circumscribed. The court is given only the power to "affirm, modify, or set aside such order in whole or in part." Id. It is not granted any broad equitable powers such as the power to grant injunctions and restraining orders (see, e.g., Sections 314 and 317 of the Act which invest these powers in the district courts) or the power to issue such orders as to it may seem just and proper (see, e.g., Section 10(e) and (f) of the NLRA, 49 Stat. 454, 455). Therefore, although Section 313(b) of the Act provides an independent basis for the court's jurisdiction, *Congress made it abundantly clear that a court of appeals reviewing FPC action under that section sits as a court of law rather than as a court of equity.* It follows that the exercise of equitable powers in Section 313(b) proceeding is without Congressional authority. (Petition at 11.) (Emphasis supplied).

Had I&M taken the trouble to read *all* of Section 313, perhaps its view would change. Section 313(c) provides:

> (C) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. *The commencement of proceedings under subsection (b) of this section shall not, unless*

> *specifically ordered by the court, operate as a stay of the Commission's order.* (Emphasis supplied).

In *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F.2d 921 (D.C. Cir., 1958), dealing with Section 19(c) of the Natural Gas Act (the counterpart to Section 313 (c)), the Court made it quite clear that, in appropriate circumstances, it has the *equitable* authority to intercede and order a stay or injunction of Commission proceedings. While the petitioner there was not successful in invoking the equitable powers of the Court, the Court clearly rejected a Commission challenge to its *equitable jurisdiction.* 259 F.2d at 924.

I&M is aware of the *Virginia Petroleum* decision and its applicability to the Federal Power Act. In the *Richmond* dispute, *supra*, one of the petitioners there (Anderson Power & Light of the City of Anderson, Indiana) attempted to invoke the equitable jurisdiction of the Court on January 2, 1973, when it filed a motion for a stay of the disputed orders of the Commission. Both the Commission and I&M resisted the motion on the ground, *inter alia*, that the movant could not show the requisite *irreparable injury* as required by the Court in *Virginia Petroleum.*

I&M also challenges the Court of Appeal's interpretation of this Court's decisions in *United States* v. *Morgan*, 307 U.S. 183 (1939) and *Ford Motor Corp.* v. *NLRB*, 305 U.S. 364 (1939). *See*, I&M Petition at 9-19. It is submitted that I&M's interpretation of these decisions is incorrectly restrictive, ignores the plain words used by this Court in each, and disregards subsequent interpretations of both by recognized experts in the field.

In *Morgan*, this Court stated:

> Congress having by the Packers and Stockyards Act established the public policy of maintaining reasonable rates for stockyard services, and having pro-

> hibited and declared unlawful any unjust or unreasonable rate, *a court of equity should be astute to avoid the collection of unlawful rates* . . . (307 U.S. at 194). (Emphasis supplied).

In the present instance, I&M attempted to use the process of the Court of Appeals to collect, for the full suspension period, rates found to be clearly excessive by the Commission without first having informed the Commission or the parties of its intent to so do in its petition for rehearing. It was clearly not error for the Court of Appeals, under these circumstances, ". . . to avoid the use of its process to effectuate the collection of unlawful rates."

In *Ford Motor Corp.*, this Court stated:

> (W)hile the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. *The purpose of the judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements.* (305 U.S. at 373). (Emphasis supplied).

Here, I&M wholly ignores the principles enunciated in *Ford Motor Corp.* I&M argues for a clearly *unjust* result based on a clearly restrictive and *technical* reading of the Federal Power Act.[2]

Professor Kenneth Davis, in his Treatise on Administrative Law, forcefully indicates that *Morgan* and *Ford* support a broad theory of equitable power. Professor Davis states:

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[2] While I&M may believe the Court of Appeals has "intrude(d) upon the administrative processes" in its decision, the Commission itself does not share this view as evidenced by its support of the Court's action.

> The Supreme Court has declared that a proceeding in the Court of Appeals on a petition for review is controlled by equitable principles and the court has equity power, even though the statute does not explicitly so provide. (3 K. Davis, Administrator Law Treatise. Sec. 23.03 (1958)).

As sufficient support for the above broad proposition, Professor Davis cites *Morgan* and *Ford*, *Ibid.* at 304, fn. 32 (1958). The Court of Appeals' interpretation of *Morgan* and *Ford* therefore is clearly consonant with this view.

Finally, I&M, in Point III of its Petition attempts to convince this Court that the equitable action taken by the Court of Appeals departed from the permissible scope of administrative review. The three cases primarily relied upon by the petitioner do not support petitioner's contention.

FPC v. *Idaho Power Co.*, 344 U.S. 17 (1952), considered the powers vested in the Court of Appeals by Section 313(b) of the Federal Power Act. As stated hereinabove, this Section grants the Court of Appeals the power to "affirm, modify, or set aside in whole or in part" an FPC order. I&M highlighted portions of this Court's opinion stating that the Court of Appeals' power "is not the power to exercise on essentially administrative function." *See*, I&B Petition at 23, *citing*, *FPC* v. *Idaho Power*, *supra* at 21. Auburn does not quarrel with this proposition.

However, a brief analysis of the facts in *Idaho Power* shows that the Court of Appeals there, rather than implementing the decision of the FPC, had "usurped the administrative function" by substituting its own judgment for that of the administrative agency. This Court properly recognized that the discretionary decisions delegated by Congress to agencies should not be second guessed by a Court of Appeals, since an appellate tri-

bunal is inherently limited in any administrative decisional process by a lack of expertise and proper fact finding procedures. 344 U.S. at 21.

However, that is not the situation in the instant litigation. Here, the Court of Appeals did not second guess or usurp the administrative function. It rather implemented the decision of the FPC by use of its equitable powers. The doctrine of judicial restraint laid down in *Idaho Power* has not been violated by the Court of Appeals' action in this case. I&M's reliance on *Idaho Power* is conceptually misplaced.

Two additional cases primarily relied upon by the petitioner in this action are *Alaska Steamship Co.* v. *FMC*, 362 F.2d 406 (9th Cir., 1966) and *Phillips Petroleum Co.* v. *FPC*, 227 F.2d 470 (10th Cir., 1955). These two cases deal with situations where, because of procedural errors, the administrative agencies involved lost power to suspend rates or take certain action. The two Courts of Appeals refused to correct the effect of the procedural error by injunctive remedy. However, neither court anywhere indicated that it was *without power to so act.* The rationale of these decisions is unclear. It can be postulated that each court simply found that the equities were not as heavily weighted in favor of the parties requesting relief as they are here in the immediate case. It is certainly not clear, as I&M contends, that each court felt that it lacked jurisdiction to act. These cases are wholly insufficient, therefore, to show that Section 313(b) of the Federal Power Act extinguishes the traditional equity power of the courts.

This Court has stated that the federal court's equitable powers should not be restricted without clear legislative intent to do so. *Mitchell* v. *De Maris Jewelry, Inc.*, 361 U.S. 288, 291 (1960). This Court has also indicated the value of equitable jurisdiction in *Porter* v. *Warner*

Holding Company, 328 U.S. 895, 398 (1946), where it stated:

> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction. (Citations omitted).

The equitable action of the Court of Appeals under the Federal Power Act is clearly supported by decisional authority under the Natural Gas Act and is consistent with principles established by this Court. The action of the Court of Appeals below, therefore, does not deserve nor require review by this Court.

ARGUMENT II

SINCE SUFFICIENT DOCTRINAL JUSTIFICATION EXISTS FOR THE DECISION OF THE COURT OF APPEALS, AND SINCE THE DISPUTE HERE IS EPISODIC, OF SIGNIFICANCE ONLY TO THE LITIGANTS, AND WILL NOT OCCUR AGAIN, THIS COURT NEED NOT INTERCEDE IN THE RELATIONSHIP OF THE LITIGANTS

A long line of cases decided by this Court has indicated that the discretion to issue a Writ of Certiorari should be exercised sparingly and with great caution. Particularly in instances where there is no inter-court decisional conflict, the writ should be issued only where, for instance, there exists an important question of law which is of a recurring nature. *Glus* v. *Brooklyn E. Terminal Co.*, 359 U.S. 231 (1959); *Ex Parte Law Ow Bew*, 141 U.S. 583 (1891). In order to conserve judicial

time and energy, this Court has wisely determined that, where the discretionary writ is the avenue of Supreme Court review, cases which are of significance solely to the litigants before the Court should not be reviewed. *See, e.g., Rudolph* v. *United States*, 370 U.S. 269, 270 (1962); *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74, 78 fn. 2 (1955); *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

I&M here seeks review by this Court of a conflict which will not again arise. The Court of Appeals held the Commission's 60-day filing regulation illegal and *ultra vires*. The Commission itself agreed with that decision in its petition for rehearing and the intervenors, who did not concede the point, nevertheless do not seek review of that portion of the Court of Appeals' decision here.

As indicated in the Counterstatement of the case, the need for the equitable action taken by the Court of Appeals in the petition for rehearing arose as a result of the reliance of the Commission and the intervenors upon the sixty-day filing regulation of the Commission. 18 C.F.R. Section 35.13(b)(4)(i) (1973). The Commission delayed its order of a five-month suspension of I&M's proposed rates until after the statutory thirty-day time limit had elapsed. Although the sixty-day regulation had been in effect for a considerable period of time and had been recognized *sub silentio* as being valid, the Court of Appeals declared the sixty-day filing requirement unlawful. *Indiana & Michigan Electric Co.* v. *FPC*, 502 F.2d 336 (D.C. Cir., 1974) (sixty-day regulation unlawful); *Municipal Light Boards* v. *FPC*, 450 F.2d 1341 (D.C. Cir., 1971), *cert. denied*, 405 U.S. 989 (1972) (*sub silentio* approval of regulation).

The effect of holding the regulation unlawful was threefold. First, I&M's proposed rates were held to have become effective thirty days after the original I&M filing and before the Commission's suspension order. Second,

the Commission was powerless to order the five-month suspension which it had deemed proper. Third, the Commission was deprived of authority to order refunds by I&M to its customers. *See, Indiana & Michigan Electric Co.* v. *FPC*, 502 F.2d 336, 344 (D.C. Cir., 1974).

This inequitable situation arose in part because of the Commission's reliance upon the validity and legality of its sixty-day filing requirement and in part because of I&M's failure to raise all jurisdictional issues before the Commission. The decision by the Court of Appeals declaring the regulation unlawful has the natural and intended effect of forcing the Commission, in the future, to make all necessary decisions within the statutory thirty-day limit. This decision has the further effect of serving as a warning to future litigants that they will be awarded only the relief requested before the Commission.

Thus, the Commission, whose responsibility encompasses ruling upon the legality of proposed rate changes, will no longer defer a preliminary decision and suspension order past the thirty-day time limit since to do so would result in the immediate application of the new rate and in the loss of the Commission's jurisdiction to subsequently review that rate and, in appropriate cases, order refunds. *Indiana & Michigan Electric Co.* v. *FPC*, 502 F.2d at 345.

A Court of Appeals, then, will not have the occasion in the future, to use its equitable powers to order that the effective date of the new rate be postponed for equitable reasons. Hopefully, the Commission, to preserve its own jurisdiction over the rate proceeding, will have determined the justification for and length of a suspension within the allotted thirty-day period and will not lose its jurisdiction and authority out of reliance upon the now ineffectual sixty-day filing requirement.

Under the narrow and limited circumstances of this case, the exercise of this Court's discretion should not result in the issuance of a Writ of Certiorari in this case. *Cf. Magnum Co.* v. *Coty*, 262 U.S. 159, 163 (1923). As this Court pointed out in *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955):

> A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic.

I&M's stance in the instant litigation is clearly episodic and not likely to recur. Further, the interests here are solely those of the litigants. In the circumstances of this case, where there exists sufficient doctrinal authority for the decision below, there is no sufficient basis for invoking the jurisdiction of this Court.

ARGUMENT III

THE COURT OF APPEALS DECISION HERE IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *ARROW TRANSPORTATION COMPANY* V. *SOUTHERN RAILWAY COMPANY*, 372 U.S. 658 (1963)

I&M placed great reliance in its Petition on this Court's holding in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963) (hereinafter referred to as *Arrow*). *See*, I&M Petition at 19-22. This reliance is wholly unfounded in light of factual distinctions between *Arrow* and the instant litigation. These factual disparities go to the core of this Court's reasoning in *Arrow*, thus rendering *Arrow* inapplicable to this litigation.

The controversy in *Arrow* arose following a proposal by Southern Railway and several other carriers for a reduction of their freight rates. The ICC, pursuant to statutory authority, suspended the proposed rate for the maximum allowable period of seven months while the Commission sought to reach a decision on the appropriateness of the proposed rate. 372 U.S. at 659-60; 49 U.S.C. Section 15(7) (1970) (ICC suspension power). The Commission failed to reach a decision within the suspension period and an additional extra-statutory five-month rate suspension was agreed to by the respondent carriers. *Ibid.* at 60.

At the expiration of this additional time period, the Commission still not having reached a decision, the plaintiffs in *Arrow* instituted injunctive proceedings in the district court for yet another suspension. The district court, Court of Appeals and this Court decided that the seven-month suspension period had been Congressionally determined as the maximum time for the suspension of rates and thus, the district court was powerless to grant injunctive relief. *Ibid.* at 661-62.

This brief analysis of the *Arrow* factual situation exposes the two basic distinctions which render *Arrow* inapplicable to the instant litigation. First, the petitioners in *Arrow* sought a suspension of the time of rate effectiveness which was *longer* than the maximum time period allowable by the statute. In the instant proceeding, the Court of Appeals reaffirmed that the five-month suspension period under the Federal Power Act must be adhered to. *Indiana & Michigan Electric Co.* v. *FPC*, 502 F.2d at 344.

Second, the petitioners in *Arrow* sought the extended suspension period in the absence of any indication by the ICC of the appropriateness or necessity of the extra suspension. The district court, in effect, was asked to sit as the administrative agency and balance the numer-

ous factors normally delegated to the discretion of the ICC. Here, however, the Court of Appeals merely implemented, on equitable grounds, the carefully and conclusively determined Commission decision of the need and appropriateness of rate suspension.

This Court, in *Arrow* emphasized the illegality of extending the time period of the suspension *beyond* the statutory maximum. This Court, citing the Court of Appeals decision in *Arrow* stated that, "Congress, in its wisdom has fixed seven months as the *maximum period* of suspension. It seems clear to us that if the courts extend that period they are in effect amending the statute and that is a matter beyond their power." 372 U.S. at 662, *quoting Arrow Transportation Co.* v. *Southern Railway Co.*, 308 F.2d 181, 186 (5th Cir., 1962) (Emphasis supplied). The Court in Arrow further indicated the importance of the time period of the suspension by closely analyzing the legislative history of the determination of the seven-month maximum ICC suspension period and determining that the seven-month maximum must be adhered to. 372 U.S. at 662-666.

Thus, *Arrow*, properly read, shows this Court's aversion to federal court rate suspension *beyond* the statutorily determined maximum by injunctive order. In its August 14 decision, the Court of Appeals correctly adhered to the maximum period of suspension imposed by the statute and did not raise the troubling issue of judicial alteration by injunctive fiat of a Congressionally determined regulatory scheme.

The second factor clearly distinguishing *Arrow* from the present litigation concerns the role of the federal courts *vis-a-vis* the jurisdiction of the agencies involved in these two cases. In *Arrow*, the district court was asked to extend the suspension period in the absence of a determination by the ICC that the extended suspension period was necessary. The district court in *Arrow* would

then have had to assume the role of the ICC and make a discretionary decision concerning the need for the suspension without the expertise and fact-finding facilities of the ICC. This Court recognized the dangers of judicial usurpation of administrative roles and condemned the action stating:

> Our conclusion from the history of the suspension power is buttressed by a consideration of the undesirable consequences which would necessarily attend the survival of the injunction remedy. A court's disposition of an application for injunctive relief would seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable. But such consideration would create the hazard of forbidden judicial intrusion into the administrative domain. Judicial cognizance of reasonableness of rates has been limited to carefully defined statutory avenues of review. These considerations explain why courts consistently decline to suspend rates when the Commission has refused to do so, or to set aside an interim suspension order of the Commission. If an independent appraisal of the reasonableness of rates might be made for the purpose of deciding applications for injunctive relief, Congress would have failed to correct the situation so hazardous to uniformity which prompted its decision to vest the suspension power in the Commission. (372 U.S. at 669-671.) (footnotes omitted).

These dangers which clearly demand judicial restraint are *not* present in the instant litigation. The Court of Appeals here did not assume the role and duties of the Commission. The Commission, after fact finding and due consideration, determined that the suspension of the excessive rates requested by I&M was proper and, in its exercise of discretion, ordered the suspension. The Court of Appeals did *not* question this judgment. The court simply implemented it. Thus, the Court of Appeals did not intrude upon the administrative domain and made

no independent appraisal of the reasonableness of the rate.

Rather, the Court of Appeals, based upon the FPC finding of the need for suspension, examined the judicially manageable considerations of imminence and irreparable harm and implemented the decision of the Commission in light of equitable considerations.

The determinative factors of *Arrow*, thus, are not present in this case. The Court of Appeals' August 14 decision merely implemented an agency decision which called for suspension of rates within the metes and bounds of the time periods of the statutory scheme. The reliance of I&M on *Arrow* in Point II of its Petition is, therefore, clearly unfounded.

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Wallace L. Duncan, hereby certify that on December 11, 1974, the Brief for Respondent in Opposition in the above-captioned proceeding was served upon counsel by mailing a copy by first class mail, postage prepaid, as follows:

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